COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, DECEMBER 5, 2001

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION.

v. CASE NO. PUE000388

COLUMBIA GAS OF VIRGINIA, INC.

ORDER ON RECONSIDERATION

On September 20, 2001, Columbia Gas of Virginia, Inc. ("Columbia" or "the Company"), filed with the State Corporation Commission ("Commission") a Petition for Reconsideration of the Commission's Final Order of September 5, 2001.

Pursuant to Rule 5 VAC 5-20-220 of the Commission's Rules of Practice and Procedure, the Commission determined that Columbia's Petition for Reconsideration should be granted in order to allow the Commission to retain jurisdiction over this matter while the issues raised by the Company were reviewed. Accordingly, an Order granting the Company's petition was entered on September 26, 2001, providing, *inter alia*, that the provisions of our September 5, 2001, Order would be suspended pending the resolution of the Petition for Reconsideration.

Thereafter, on October 2, 2001, the Commission issued an Order Establishing Procedures on Reconsideration ("the October 2 Order") in which the Commission Staff was directed to file, on or before October 26, 2001, a response to the Company's petition for reconsideration, addressing the issues raised and developed therein. The October 2 Order also permitted the Company to file any rebuttal it deemed appropriate not later than November 9, 2001. Finally, the October 2 Order directed that pending the Commission's reconsideration of this matter, the

Commission's Final Order of September 5, 2001, would continue to be suspended, and this matter was continued until further order of the Commission.

The Commission has reviewed the Company's September 20, 2001 Petition for Reconsideration, the Commission Staff's October 26, 2001 Response thereto, and the Company's November 9, 2001 Reply. In so doing, and as discussed below, the Commission has determined that the relief requested by the Company in its Petition for Reconsideration should be denied.

The primary issue raised by the Company's Petition for Reconsideration was whether the Commission's authority to order refunds in this matter, is limited to a twelve-month period pursuant to the provisions of Section 7.4 of the Company's tariff on file with the Commission. This tariff language addresses the resolution of billing errors by and between the Company and its customers. As discussed below, this tariff language does not limit or obviate the statutory obligation of this Commission to enforce, without limitation, the terms of the Company's tariff.

By way of background, we note that the central issue presented by this case, and addressed in our September 5, 2001, Order, was whether a billing practice the Company applied to an entire group of its transportation customers violated the Company's tariff. We held that the practice at issue violated the Company's tariff, a determination that the Company has not presented for reconsideration in its petition before us.

With respect to the collateral issue raised by the petition (whether Section 7.4 limits this Commission's authority vis-à-vis refund relief), the record in this proceeding is devoid of any suggestion that the Company's application of the interruptible non-gas rate blocks of Rate Schedule LGS to excess volumes sold to the Company's banking and balancing service customers was the result of error. Indeed, the evidence is to the contrary. [1]

[1] As pointed out in the Staff's October 26, 2001 Response to the Company's Petition, the Company's principal witness, Robert E. Horner, stated that the Company was correct in its application of Rate Schedule LGS in this fashion. (See, Staff's Response pg. 3).

Further, we do not agree that tariff violations resulting from "incorrect interpretations" of regulated utilities' tariffs can and should be categorized or treated as "billing errors" within the aegis of Section 7.4's twelve-month liability limitation, as the Company invites us to do in its Petition for Reconsideration.[2] To do so, in our view, would suggest that this Commission's regulatory oversight with respect to Company overcharges, in this context, is invoked solely by the actions of the Company's customers pressing the Company for refunds.[3] Of course, such a construction would collide with this Commission's overarching, regulatory duties imposed by the Virginia State Constitution and Virginia statutory law charging the Commission with the duty of regulating the *rates, terms and charges* of the Commonwealth's public service companies.[4]

We agree with the Commission Staff that § 56-234 of Code of Virginia requires a different result, namely, that the Company has an *unconditional* obligation under § 56-234 to refund charges that violate its filed tariff.[5] Put simply, each and every provision of the Company's tariff (including Section 7.4) must be read in the light of that General Assembly mandate. This Commission has a concomitant obligation to enforce that statutory requirement, and it is in the enforcement thereof, that we hereby deny the relief sought by the Company in its Petition for Reconsideration to limit its refund obligation to the twelve-month period

[2] Company's September 20, 2001, Petition for Reconsideration, pg. 5.

[3] The Company argues that Section 7.4 of its tariff imposes a legal, contractual obligation on Old Virginia Brick (the complaining customer in this case) and all other customers similarly situated, i.e., transportation customers under Rates Schedule TS1/TS2 receiving banking and balancing services. Thus, according to the company, "it [Old Virginia Brick] should not have expected to receive compensation for billing errors more than twelve months prior to March 24, 2000 [the date Old Virginia Brick complained to the Commission Staff about the billing practices that were the subject of this litigation]." See, Company Reply, pp. 3-4.

[4] *See*, Constitution of Virginia, Art. IX, § 1, and § 12.1-12 of the Code of Virginia.

[5] See also, *Chesapeake and Potomac Telephone Co. of Va. v. Bles*, 218 Va. 1010 (1978).

immediately preceding Old Virginia Brick's complaint to the Commission Staff on March 24, 2000.[6]

To put a finer (and final) point on the main issue raised in the Company's Petition for Reconsideration, it is long-settled Virginia law that tariffs are to construed most strongly against those who frame them.[7] Moreover, and as the Virginia Supreme Court has emphatically stated, when "the language of a tariff is fairly susceptible of a reasonably plain meaning, that construction should be put upon it. *It is not the part of the judicial expositor to inquire whether or not, by strained or forced interpretation of separate words or paragraphs considered disconnectedly, some other construction might be possible."*[8] (emphasis added).

The reasonably plain meaning of Section 7.4 is manifest in its heading ("Adjustment of Billing Errors"); within its scope (customer "undercharge[s]" and "overcharge[s]"); and within its express applicability to the "parties" (i.e., the Company and its customers) efforts to "agree on the adjustment of any claimed error." Only a "forced or strained construction" would seek to wring from that plain and unambiguous language, limitations on the Commission's authority to order refunds in the event of Company tariff violations, and we decline to do so here. It is also abundantly clear that any such strained construction would still be subordinate to the provisions of Virginia Code § 56-234 which ultimately guides and directs our decision in this case.

Finally, we note the discussion in the Company's petition and its Reply generated by our September 5, 2001, Order's comments with respect to the Company's potential application of

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[6] The request for relief does not square with the language in Section 7.4, in any event, because the twelve-month "look back" period is triggered by a claim of billing error by the Company's customers to the Company, or *vice-verse*—not by a customer complaint to this Commission. This is corroborated by the last sentence of Section 7.4 that begins "[I]f the *parties* are unable to agree on the adjustment of any *claimed error…."* (emphasis added). The irrelevance of Section 7.4 insofar as making the Commission a player in billing error adjustments or, by extension, imposing limitations on the Commission's authority to craft appropriate remedies for tariff violations, is thus made clear.

[7] *Smokeless Fuel Company v. The Chesapeake and Ohio Railway Company*, 142 Va. 355, 371 (1925)

[8] *Id*, at 371.

Section 7.4 to the collection of gross receipts taxes.[9] The Staff in its October 26, 2001 Response correctly notes that our observations were *dictum*;[10] the Company introduced no evidence into the record with respect to its collection or non-collection of gross receipts taxes from transportation customers taking excess volumes under the banking and balancing provisions of the Company's TS1/TS2 tariff.

However, the Company in its Reply evidently misunderstood our comments concerning the gross receipts tax issue when it characterized them as "*holding* that the Company may collect any gross receipts taxes it failed to collect under rate Schedule TS1/TS2."[11] (emphasis added) To restate what we said in our September 5, 2001, Order, the Company's tariff (Original Sheet 165, No. 12) permits the Company to obtain payment for gross receipts taxes from its transportation customers receiving banking and balancing services. That is the plain language of the Company's tariff.

In sum, whether the Company has, or has not, collected gross receipts taxes from its transportation customers receiving banking and balancing services, *as a matter of fact*, is not part of the record before us, and, therefore, is not, before the Commission in this proceeding.[12] While we noted, *in dictum*, as part of our September 5, 2001 Order that Section 7.4 of the Company's tariff would limit Company to collect these taxes if such failure to do so was associated with

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[9] Commission's Final Order of September 5, 2001, pg. 17 and footnote 57.

[10] Commission Staff's Response dated October 26, 2001, pp. 4-5.

[11] Company Reply of November 9, 2001, pg. 8.

[12] The Company takes, in any event, the novel view that to the extent the Company may have failed to collect any such gross receipts taxes, such a failure would have been part and parcel of the same intentional act by which it was unintentionally misapplying its tariffs resulting in the overcharges subject of this proceeding. Thus, the Company argues, if the Commission believes that the twelve-month limitation of liability period of Section 7.4 applies to any erroneous failure to collect gross receipts taxes, then it must also apply that same twelve-month limitation to any other refunds ordered in this case. (See, Company Reply of November 9, 2001, pp. 7-8). We do not believe that one follows from the other

billing error,[13] that issue is not presently before us for adjudication. However, as the Staff notes in its October 26, 2001 Response to the Company's petition,[14] to the extent that the Company might seek to set off uncollected gross receipts taxes against its refund liabilities resulting from the Commission's orders in this case, the question may ripen into one requiring this Commission's review.

Finally, we will by way of this Order, clarify and modify the third Ordering Paragraph in our September 5, 2001, Order to provide that the refunds ordered therein shall be made subject to the payment of interest thereon, as provided below. Additionally, the Fourth Ordering Paragraph our September 5, 2001, Order will be modified to keep the docket in this case open, pending the Company's completion of its refund obligations under these Orders.

Accordingly, IT IS ORDERED THAT:

(1) The relief requested by the Company's in its Petition for Reconsideration in this matter is hereby denied, in all respects.

(2) The Commission's September 5, 2001 Order in this matter is reinstated in all respects, except as modified herein, and no part thereof is further suspended.

(3) The Third Ordering Paragraph of our September 5, 2001 Order in this matter is amended to provide that the Company shall make all refunds required pursuant to such paragraph forthwith, with interest. Interest upon the ordered refunds shall be computed from the date payment of any customer's monthly bill containing overcharges was due until the date refunds are made, at an average prime rate for each calendar quarter. The applicable average prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one-hundredth of one

[13] The Order provides that "[T]o the extent that the Company has omitted to obtain payment from its transportation customers for [gross receipts] taxes otherwise due under this tariff language, its tariff would, however, limit its ability to collect such taxes to *the twelve month period immediately preceding any billing statement allegedly in error.*" (emphasis added) September 5, 2001, Order, pg. 17.

[14] Staff's October 26, 2001 Response, pg. 5, footnote 11.

percent of the prime rate values published in the Federal Reserve Bulletin, or in the Federal Reserve's Selected Interest Rates ("Selected Interest Rates") (Statistical Releases H.15), for the three months of the preceding calendar quarters. The interest required to be paid herein shall be compounded quarterly.

(4) The refunds ordered pursuant to paragraph (3) above, and in the Third Ordering Paragraph of our September 5, 2001 Order in this matter, may be accomplished by credits to the appropriate customer accounts for current customers (each such refund category being shown separately on each customer's bill). Refunds to former customers shall be made by check to the last known address of such customers when the refund amount is $1 or more. The Company may retain refunds owed to former customers when such refund amount is less than $1; however, the Company shall prepare and maintain a list detailing each of the former accounts for which refunds are less than $1, and in the event such former customers contact the Company and request refunds, such refunds shall be made promptly. All unclaimed refunds shall be handled in accordance with § 55-210.6:2 of the Code of Virginia.

(5) Within 60 days from the date of this Order, the Company shall file with the Staff a document showing that all refunds have been lawfully made pursuant to this Order, and itemizing the cost of the refunds and accounts charged. Such itemization of costs shall include (i) computer costs, and (ii) personnel hours, associated salaries and other costs related to verifying and correcting the Company's refund methodology and developing any computer programs required therefor.

(6) The Company shall bear all costs of the refunding directed in this Order and in our Order of September 5, 2001, concerning this matter.

(7) The Fourth Ordering Paragraph in our September 5, 2001 Order in this matter is hereby modified to provide that (i) the docket in this matter shall remain open, pending the

Company's completion of its refunding obligations ordered by this Commission, and (ii) this matter is continued until further order of the Commission.